maintain the plea. This is the same, *mutatis mutandis*, as adducing the fact of a foreign judgment for the plaintiff to maintain his right of recovery against the defendant in his action of assumpsit upon that judgment. The confusion on this subject seems to result from not distinguishing between a domestic judgment as constituting of itself a *debt* of *record* and a foreign judgment, which is only evidence of an indebtedness as upon a simple contract.

Judgment reversed and cause remanded.

Supreme Court of Ohio.

PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY COMPANY *v.* BARRETT ET AL.

Where goods are received by a common carrier to be forwarded in the usual course of business, his liability immediately attaches; and if they are lost by an accidental fire while in his warehouse awaiting transportation, he is liable.

But if the delivery is accompanied with instructions not to forward until further orders, or if anything remains to be done to the goods by the shipper before they are to be forwarded, such liability as a common carrier does not attach.

The assent of the shipper to conditions in a bill of lading or other contract for the carriage of goods, limiting the carrier's liability, is binding upon him when the loss happens without fault or negligence of the carrier, but such assent will not be implied or presumed from facts and circumstances which do not clearly show an assent to such conditions in the contract on which the action is founded.

Neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment, can be set up to absolve a carrier from his common-law liability.

ERROR to the District Court of Greene county.

On the 22d of February and 5th of March 1873, Barrett & Walton delivered to plaintiff in error, a common carrier by rail, one hundred and forty tierces of lard, to be shipped to Colgate & Co., New York, to whom it had been sold deliverable on the cars at Spring Valley station, on the line of defendant's road. On the night of March 14th, while the lard was stored in defendant's warehouse awaiting shipment, it was destroyed by an accidental fire which originated in a store adjoining the warehouse, and without fault or negligence of the plaintiff in error, communicated to and destroyed the warehouse and all its contents.

The lard was delivered with instructions for immediate shipment. Nothing remained to be done to it by the shippers before

being loaded into the cars and sent forward. This was to be done by the railroad company without any further orders or directions from the plaintiffs.

The present action was to recover the value of the goods so lost.

The answer of the company admitted its character as a public carrier of goods, and the receipt, storage and destruction of the lard; but averred that ever since its road was opened and operated, some twenty-five to thirty years, to the present time, it had been its constant usage and custom, known to the plaintiffs, to receive goods for carriage, at this and all its other stations, upon the condition alone that it would not be held to have received the goods until they were actually put on board the cars, and that it would not be liable for loss by fire, not the result of its own, or its servants' or agents' neglect or default.

It is averred that, with knowledge of all these things, the lard was delivered and stored in said warehouse, "upon the agreement and understanding that defendant should be liable only on said conditions," and that when the goods were loaded upon the cars, a bill of lading was to be issued therefor, in accordance with said custom, and containing said provisions.

These conditions, material to the case, are as follows:

"2. Freight carried by this company must be removed from the station during business hours on the day of its arrival, or it will be stored at the owner's risk and expense; and in the event of its destruction, or damage from any cause while in the depot of the company, it is agreed that said company shall not be liable to pay any damage therefor.

"3. It is agreed, and is part of the consideration of this contract, that the company will not be responsible for * * * loss or damage to goods occasioned by providential causes, or by fire from any cause whatever, while in transit or at stations.

"7. The company will not be responsible for accidents or delays from unavoidable causes. The responsibility of this company as a common carrier, under this bill of lading, to commence on the removal of the goods from the depot in the cars of the company, and to terminate when unloaded from the cars at the place of delivery."

Upon a trial there was a verdict for plaintiff; a motion for a new trial which was overruled; a bill of exceptions taken by the

defendant; and a judgment which, on error, was affirmed by the District Court.

The opinion of the court was delivered by

JOHNSON, J.—That this lard was received by the defendant as a common carrier, for immediate shipment to Colgate & Co.; that nothing further remained to be done by the shipper, or any further orders, directions or instructions were to be given before such shipment; that it was destroyed by an accidental fire while stored in the defendant's warehouse awaiting shipment, which had been delayed by the defendant's inability to obtain the necessary cars, owing to a press of business at that season of the year, are facts conceded or clearly established by the testimony.

It also clearly appears that there was such general usage or custom as alleged known to the plaintiffs, and that at the time of the delivery of these goods they did not receive, or expect to receive, a bill of lading therefor until the lard was loaded into the cars; and when one was issued it would contain the conditions as to loss by fire shown and set out in the answer.

The principles of law applicable to the facts of this case may be summarily stated as follows:

1. Upon a delivery and acceptance of goods, under the circumstances stated, the common-law liability of a common carrier immediately attached, and if they were lost by fire while awaiting shipment, the carrier is liable to the same extent as if the goods were in transit, unless his liability has been modified, limited or restricted with the consent of the owner or shipper of the goods: *Merriam* v. *The Hartford & N. H. Railroad Co.*, 20 Conn. 354; *Trowbridge* v. *Chapin*, 23 Conn. 595; 2 Redfield on Railways, sect. 174, p. 65; *Ford* v. *Mitchell*, 21 Ind. 54; *Gleason* v. *Transportation Co.*, 32 Wis. 85; *O'Bannon* v. *Southern Express Co.*, 51 Ala. 481; *Grosvenor* v. *N. Y. Central Railroad Co.*, 39 N. Y. 34; *The Illinois Central Railroad Co.* v. *Smyser*, 38 Ill. 354; *Burrell* v. *North*, 2 Car. & Kir. 680; Schouler on Bailments, 381, ch. 4.

2. But if anything remained to be done to the goods by the shipper before they are ready for transportation, or if any orders, directions or instructions were to be given before they were to be forwarded, such liability does not attach: *Judson* v. *Western Railroad Co.*, 4 Allen 520; *Moses* v. *Boston & Maine Railroad*, 4 Foster (24 N.

H.) 71; *Blossom* v. *Griffin*, 3 Kernan 573; *Michigan Southern Railroad* v. *Shurtz*, 7 Mich. 515; *St. Louis, &c., Railroad* v. *Montgomery*, 39 Ill. 335; *Lawrence* v. *W. & St. P. Railway*, 15 Minn. 390; *Watts* v. *Boston & Lowell Railroad*, 106 Mass. 466; *Barron* v. *Eldredge*, 100 Id. 457.

3. The carrier may limit his common-law liability for losses happening without his fault or negligence by a contract, either verbal or in writing. In an action against him as such carrier, when he has received and undertaken to carry goods, the burden is upon him to establish such modified or limited liability, and to show that the loss falls within the terms of the agreement: *Graham* v. *Davis*, 4 Ohio St. 362; *Gaine* v. *Union Transportation Co.*, 28 Id. 418.

4. The assent of the shipper or owner of goods to conditions limiting common-law liability is not to be implied or presumed; but in each case of an action for a loss the assent must be shown by competent evidence, as in other cases of contract. As the carrier is bound to receive and transport all goods offered, for a reasonable compensation, subject to all the responsibility incident to the employment, the presumption is, in the absence of proof sufficient to remove it and to fix a different liability, that the shipper intended to insist on his common-law right: *New Jersey* v. *Merchants' Bank*, 6 Howard 344; *Graham* v. *Davis*, 4 Ohio St. 376; *Adams Express* v. *Nock*, 2 Duval 563; *Railroad* v. *Man. Co.*, 16 Wallace 329.

5. In each case the question is, what are the terms of the contract of shipment? Are they such as the law prescribes or such as the parties agreed to? This being a question of fact, usage or custom cannot be set up to absolve the carrier from his ordinary duties, which public policy, his general undertaking or his special promise may have bound him to do: *Coxe* v. *Heisley*, 19 Penn. St. 243; *McMasters* v. *The Pennsylvania Railroad Co.*, 69 Id. 374; *The Sultana* v. *Chapman*, 5 Wis. 454; *Cox et al.* v. *Peterson*, 30 Ala. 608; Schouler on Bailments 442.

Upon a careful review of the testimony, which consists mainly of the evidence by the plaintiffs themselves, one of whom had for many years been, and was at the time this lard was received, also the agent for the carrier who received and stored the same, and was diligent as such agent in trying to procure cars for shipping it, we think the allegation in the answer to the effect that said goods

were put in said warehouse upon the agreement and understanding that the defendant should not be liable for a loss by accidental fire, was clearly made out. Such being the case, the common-law liability is limited by this special agreement.

When such is the case, there is no rule of law or principle of public policy, that forbids the enforcement of the restricted liability.

Judgments of the Common Pleas and District Court reversed and cause remanded.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ILLINOIS.[2]

COURTS OF APPEAL OF LOUISIANA.[3]

SUPREME COURT OF MICHIGAN.[4]

SUPREME COURT OF MISSOURI.[5]

ACKNOWLEDGMENT. See *Evidence.*

ACTION. See *United States.*

Action against Strangers to Lease.—Recovery for the use and occupation of leased premises cannot be had against others than the lessees during the term of the lease, if it has not been assigned or the lessees discharged from liability, or if they have not surrendered their interest, or known or assented to any new lease that may have been made to the others: *Doty* v. *Gillett*, 43 Mich.

Abandonment or surrender of interests in real estate cannot be inferred from non-user alone: *Id.*

Where an action for use and occupation was brought against one of the original lessees and a stranger to the lease, and supported by evidence that the defendants acted as copartners, the latter may show their actual relation, and the contract between them may be put in evidence. They may also show that the stranger had agreed to pay what would have been his proportion of the rent under the lease to his co-defendant: *Id.*

ADMIRALTY.

Collision—Duty of Vessel entering Harbor—Negligence not Presumed—Duty of Libellant to show exercise of care on his own part.—

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[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1880. The cases will probably be reported in 12 or 13 Otto.

[2] From Hon. N. L. Freeman, Reporter; to appear in 98 Illinois Reports.

[3] From Hon. Frank McGloin, Reporter; to appear in vol. 1 of his Reports.

[4] From Henry A. Chaney, Esq., Reporter; to appear in 43 Mich. Reports.

[5] From Thomas K. Skinker, Esq., Reporter; to appear in 72 Mo. Reports.